Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHNSON & HIGGINS,

Petitioner,

vs.

BURT N. SEMPIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN F. CANNON
Counsel of Record for Petitioner
125 Broad Street
New York, New York 10004
(212) 558-4000

ROBIN D. FESSEL
SULLIVAN & CROMWELL
New York, New York

FRANCIS X. DEE
DAVID J. REILLY
CARPENTER, BENNETT & MORRISSEY
Newark, New Jersey
Of Counsel

April 13, 1995

QUESTION PRESENTED

This Court has held that in employment discrimination cases the burden of establishing a prima facie case of disparate treatment under the *McDonnell Douglas* evidentiary framework is not onerous, but that satisfaction of that burden only shifts to the defendant the burden to rebut the presumption of discrimination by producing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action, and that if the defendant has done everything that *McDonnell Douglas* would require of it in that regard, whether the plaintiff really did properly make out a prima facie case is no longer relevant. The question presented is:

> Whether the court of appeals erred in holding that a motion for summary judgment dismissing an age-discrimination claim must always be denied, regardless of the amount and quality of the evidence in the record as a whole bearing upon the nondiscriminatory character of the defendant's motivation, if the record contains (1) evidence which, if considered in isolation, is sufficient to establish a prima facie case under *McDonnell Douglas*, and (2) evidence that the defendant's nondiscriminatory reason, as characterized by the court, is "not worthy of credence" or "implausible."

PARTIES INVOLVED

Petitioner, Johnson & Higgins, is a global insurance brokerage and employee-benefits consulting firm. The firm is incorporated under New Jersey law and has its principal place of business in New York City. At all relevant times, all of the stock of Johnson & Higgins was owned by the members of its Board of Directors, who were also senior officers of the firm and its subsidiaries. (*See* Court Rule 29.1.)

Respondent, Burt N. Sempier, is a former Director of Johnson & Higgins.

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BURT N. SEMPIER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, which reversed the summary judgment of the United States District Court for the District of New Jersey in favor of Petitioner.

Review by this Court is warranted because the court of appeals' decision is contrary to decisions of this Court,[1] is in conflict with decisions from other circuits, and involves an important question of law.

OPINIONS AND ORDERS BELOW

The January 6, 1995 opinion of the court of appeals is reported at 45 F.3d 724 and reproduced in the Appendix at 1a-28a.[2] The court of appeals' February 14, 1995 order denying rehearing and rehearing *in banc* is unreported and is reproduced at 30a-31a. The March 10, 1994 memorandum and order of the district court granting summary judgment for petitioner is unreported and is reproduced at 32a-47a. The district court's memorandum and order of August 4, 1993, and its order of October 8, 1993, denying, respectively, petitioner's initial motion for summary judgment and its

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[1] The cases are (i) *St. Mary's Honor Center* v. *Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2748-49 (1993) (when defendant has produced "evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action . . . the *McDonnell Douglas* framework -- with its presumptions and burdens -- is no longer relevant" (emphasis in original)), (ii) *U.S. Postal Service Bd. of Govs.* v. *Aikens*, 460 U.S. 711, 715 (1983) ("[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case [under *McDonnell Douglas*], whether the plaintiff really did so is no longer relevant"), and (iii) *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986) (in discrimination cases (absent the *McDonnell Douglas* presumption) as in any other case, "the inquiry under [Rules 56(c) and 50(a) of the Federal Rules of Civil Procedure] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

[2] The Appendix to this Petition is cited "___a," and the Joint Appendix in the court of appeals is cited "JA___."

motion for reconsideration, are also unreported and are reproduced at 48a-55a and 56a-57a.

JURISDICTION

The decision of the court of appeals was entered on January 6, 1995. A timely petition for rehearing by petitioner was denied on February 14, 1995, and this petition is being filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the application of Fed. R. Civ. P. 56 in the context of a claim under the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621 *et seq.* The relevant sections of Rule 56 and the principal sections of the ADEA involved in this case, §§ 623(a)(1) and 626(d)(2), are reproduced at 58a-60a.

STATEMENT OF THE CASE

A. Statement Of Facts

Between June 7 and 11, 1991, the 36 other Directors of Petitioner, Johnson & Higgins ("J&H"), were polled and voted unanimously to accept the letter of "resignation as a Director, officer and employee" of J&H that, upon becoming a Director, Respondent, Burt N. Sempier, like every other J&H Director, had tendered to the Board to become effective upon acceptance by two-thirds of its members (JA368, 389, 413-14; 5a). Once he left the Board, Mr. Sempier became obligated under J&H's corporate charter to sell his J&H stock back to the firm for an agreed consideration (JA366-67). J&H "operates as if it were a partnership" (3a, n.2) and Mr. Sempier was one of the partners.

Mr. Sempier joined J&H as its Comptroller in 1968, and was its Chief Financial Officer ("CFO") and the head of its Finance Department by the time he was elected to the Board in April 1986. He became a Director basically because of the sponsorship of the then Chairman and Chief Executive Officer ("CEO"), Robert V. Hatcher, Jr. A number of Directors had reservations about Mr. Sempier's suitability (JA364-65), including the member of the Board's Executive Committee to whom Mr. Sempier reported, E. Eric Johnson (JA727-30), but they all ultimately deferred to their Chairman's wishes (JA365, 843-44). (3a-4a.)

In May 1987, however, in deference to Mr. Johnson and others, Mr. Hatcher replaced Mr. Sempier as CFO with someone who had been hired from the outside. At the same time, Mr. Hatcher named Mr. Sempier to the newly created position of Chief Administrative Officer ("CAO") to which the Management Information Systems ("MIS"), Human Resources, Professional Development, and Real Estate and Facilities Departments were directed to report. In that capacity, Mr. Sempier began reporting

to Kenneth A. Hecken, the Vice Chairman of the Board. Mr. Johnson (JA732-33) and Mr. Hecken (JA778-79) both had reservations regarding Mr. Sempier's ability effectively to lead the operations that reported to him as CAO. (4a-5a.)

Consistently with his contention that his Board colleagues had never "advised him that his performance was less than satisfactory" or brought "to his attention any deficiencies in his performance of his functions" (3a), Mr. Sempier describes his replacement as CFO as a "planned action" and says he considered his appointment as CAO a promotion (JA321).

In December 1989, after an approximately 18-month search, J&H elevated Alan G. Page to the newly created post of Chief Information Officer ("CIO"). Mr. Page had been the Manager of J&H's Risk Management Services Department. As the new CIO, Mr. Page assumed the responsibility for MIS that Mr. Sempier had had theretofore. (JA371-72, 779-82.) In his sworn representations to the district court on the summary-judgment motions Mr. Sempier said that the "reorganization of the MIS function was also a planned move," based upon MIS's "incredible growth over the years," and that he "supported the initiative and [although not in charge of that process] was also actively involved in the search for candidates for the Chief Information Officer who would head up that stand-alone department" (JA321-22). About a year before Mr. Page filled the post (JA371-72, 781), Mr. Hatcher was unsuccessful in "lobbying" his colleagues to consider Mr. Sempier for the CIO position (4a). But for his part, and again consistently with his claim "that he never received any unfavorable criticism that his performance was poor or inadequate" (16a), Mr. Sempier has sworn that he "was never a candidate for that position" (JA 322); never having been a candidate, he could not have been turned down for lack of qualifications, either absolutely or

relatively to Mr. Page, or for any other reason. (See below, pages 9-10.)

MIS had been by far the most significant of the functions that reported to Mr. Sempier as CAO, and as Mr. Hecken stated in his affidavit in support of J&H's second motion for summary judgment,

> . . . once Mr. Sempier lost the MIS responsibilities to Mr. Page, there was no longer a colorable justification for Mr. Sempier continuing as a Director of J&H. Thomas E. Carpenter was hired in March 1990 with the understanding on the part of senior management, that is, Messrs. Hatcher, [David A.] Olsen, Nielsen, Meyer and me, that he would take over Mr. Sempier's remaining duties. Initially, Mr. Carpenter took over responsibility for personnel and training and development, leaving Mr. Sempier with responsibility only for real estate and facilities. (JA782)

The reason Mr. Sempier could no longer remain a Director was simple and was articulated by Mr. Hatcher in his affidavit in support of J&H's initial summary-judgment motion (JA372-73):

> The prestige and influence associated with a Directorship at J&H, and the credibility of J&H's policy that Board seats are filled, and held, on a meritocratic basis, would be seriously compromised if Directors who were obviously making no significant contribution to the firm were allowed to occupy Board seats.

Mr. Hatcher, who was himself scheduled to retire at the end of 1990, met with Mr. Sempier on April 19, 1990. He advised him that Mr. Carpenter had been hired and, "using strong and unequivocal language, that Sempier had no choice

but to retire or be forced out" (5a, 18a, n.6). Mr. Hatcher also told Mr. Sempier that to mitigate the financial impact of his early retirement, J&H would provide him with enhancements to his existing retirement package. Written offers of improved retirement benefits were made to Mr. Sempier in September and December 1990, but Mr. Sempier had not agreed to retire by the time Mr. Hatcher retired. Thus, it fell to the new Chairman and CEO, Mr. Olsen, to achieve closure with Mr. Sempier. (JA373-77, 400-07.)

On January 4, 1991, Mr. Olsen wrote a memorandum to Mr. Sempier responding to his note to Mr. Hatcher dated December 28, 1990. Mr. Olsen said he was willing to further extend Mr. Sempier's "official" retirement date to September 30, 1991, but that all of his remaining duties (and the CAO title) would be assigned to Mr. Carpenter as soon as possible, and that there would in no event be any need for him to be in the office past March 29, 1991 (JA408).

Mr. Sempier did not leave at the end of March. Negotiations with regard to Mr. Sempier's retirement package continued into May. At the end of May, a final offer was made to Mr. Sempier and he was given until June 7 to accept it. Mr. Sempier did not accept it. By June 11, 1991, the Directors had voted unanimously to accept Mr. Sempier's previously tendered resignation. (JA410-14; 5a.)

B. The Proceedings Below

On December 12, 1991, Mr. Sempier filed an age-discrimination charge against J&H with the Equal Employment Opportunity Commission (JA490-95). By virtue of the 300-day statute of limitations on the filing of such charges, the filing was timely as to alleged violations of the ADEA that occurred after February 15, 1991 (29 U.S.C. § 626(d)(2); 60a). The Commission notified Mr. Sempier on April 7, 1992 that it had terminated its investigation of his

charge (JA496). Mr. Sempier's six-count complaint against J&H was filed in the district court on April 16, 1992.[3] The first count under the ADEA alleged that "[o]n June 11, 1991, plaintiff's employment was involuntarily terminated by defendant on account of plaintiff's age and in retaliation [for] plaintiff's refusal to 'voluntarily' accept defendant's early retirement proposals." The other five counts alleged state statutory and common-law claims. (JA378-88.)

The district court denied J&H's initial motion for summary judgment on August 4, 1993 (48a-55a), and its motion for reconsideration on October 8, 1993 (56a-57a). However, on March 10, 1994, it granted J&H's second motion for summary judgment. The ADEA and state-law age-discrimination claims were dismissed with prejudice; Mr. Sempier's other three claims were dismissed without prejudice for want of an independent jurisdictional basis. (32a-47a.)

The court of appeals reversed. It first considered whether Mr. Sempier had enough evidence to make out a prima facie case under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and concluded that he had:

> (a) The district court had held that Mr. Sempier's evidence failed to satisfy the "qualifications" prong of a prima facie case under the *McDonnell Douglas* evidentiary framework as articulated by the court of appeals in the age-discrimination context in *Chipollini* v. *Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.) (in banc), *cert. dism'd*, 483 U.S. 1052 (1987) (36a-37a). But the court of appeals found Mr. Sempier's "record of his twenty years of employment as an executive" to be sufficient evidence "that he was

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[3] The district court had jurisdiction pursuant to 29 U.S.C. § 626(c) and 28 U.S.C. § 1331.

qualified for the position from which he was discharged" (11a).

(b) The district court had also expressed doubt that Mr. Sempier had met his burden under the *Chipollini* prong that required him to show that "he ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination" (34a), inasmuch as Mr. Carpenter, at age 54 when hired, was only four years Mr. Sempier's junior, and the senior Directors responsible for Mr. Sempier's termination ranged in age from 52 to 59 (38a-39a). But the court of appeals disagreed, holding that the age difference of over ten years between Mr. Sempier and Mr. Page (above, pages 5-6) should also have been considered: "The combined differences in age between Sempier on the one hand and Page and Carpenter on the other is clearly sufficient to satisfy the fourth [*Chipollini*] prong of a prima facie case by raising an inference of age discrimination" (12a; footnote omitted).

The court of appeals asserted that Mr. Page's age was probative of an age-based motive for the Board's acceptance of Mr. Sempier's resignation in June 1991 in spite of (and without addressing) (i) Mr. Sempier's sworn statement that he had never been a candidate for the CIO position to which Mr. Page had been promoted in December 1989, (ii) the fact that Mr. Hatcher's unsuccessful "lobbying" on Mr. Sempier's behalf had occurred about a year before Mr. Page emerged as the successful candidate (JA371-72, 781-82), (iii) the absence of any evidence as to Mr. Sempier's qualifications for the CIO post relative to Mr. Page's, other than statements in Mr. Hecken's affidavit to the effect that Mr. Page was qualified and Mr. Sempier was not (JA779, 781-82), (iv) the absence of any allegation by Mr. Sempier that age was a factor in Mr. Page's promotion, and (v) the fact that the district court plainly understood that on the record before it (*e.g.*, the charge (at JA 495) and the

complaint (at JA 11)) Mr. Sempier's contention was that he had been replaced by Mr. Carpenter (53a; 38a).

The court of appeals further found, as the district court had, that J&H met its burden under *McDonnell Douglas* of producing evidence of its nondiscriminatory reason for accepting Mr. Sempier's resignation (13a-14a).[4] It characterized that evidence, however, as follows:

> Here, J&H has presented two reasons. First J&H states that it terminated Sempier because his duties no longer justified retaining him in his position. Second, it contends that Sempier performed those duties poorly. (13a)

The first reason fairly reflected J&H's position, but the second did not. J&H's contention -- based upon what the district court correctly found was the "undisputed evidence regarding its policy on directorships" (42a) -- was that Mr. Sempier's resignation was accepted in June 1991 because even good performance of the limited duties he had -- more accurately, was squatting on -- could not justify his remaining a Director, in essence a partner, of the firm.

The court of appeals then proceeded to expand (implicitly) the poor-performance issue it had posited to include Mr. Sempier's performance from 1986 on (13a-14a). The effect was to extend the *McDonnell Douglas* framework to require that J&H have adduced evidence articulating nondiscriminatory reasons for actions that had not been made the subject of a timely age-discrimination charge, *see United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977), and

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[4] Under this Court's decision in *Aikens* (see n.1, above, page 2), this finding by the court of appeals renders irrelevant the legal errors that J&H believes the court committed in finding that Mr. Sempier had evidence sufficient to establish a prima facie case under *McDonnell Douglas*.

thereby to give Mr. Sempier more to shoot at on the so-called "pretext" phase of the *McDonnell Douglas* framework.[5]

Finally, the court of appeals found that Mr. Sempier had produced sufficient evidence to allow a jury to find that J&H did not terminate him for poor performance. (15a-18a; see below, n.6 at page 19.) Under the court of appeals' analysis, the existence of that issue, together with its finding that Mr. Sempier had made out a prima facie case (above, pages 8-9), mandated denial of J&H's motion:

> [T]o defeat a summary judgment motion based on a defendant's proffer of a nondiscriminatory reason, a plaintiff who has made a prima facie showing of discrimination need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence.

(9a; citing the court of appeals' earlier holding to the same effect in *Fuentes* v. *Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)). In a "recap" of its analysis the court of appeals held that under this Court's decision in *St. Mary's Honor Center* v. *Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993), even though J&H's evidence had dispelled the presumption of discrimination arising from Mr. Sempier's alleged prima

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[5] Because the court of appeals held that J&H had articulated a nondiscriminatory reason under *McDonnell Douglas* for accepting Mr. Sempier's resignation, the legal errors involved in its further analysis of that reason, though fairly raised (Court Rule 14.1.(a)), do not have to be addressed in order to consider the question presented by J&H's Petition. Moreover, if the question presented is answered in the affirmative as J&H will urge it should be, J&H will further argue that the classification of any relevant evidence in terms of the *McDonnell Douglas* framework is irrelevant under the legal standard the court of appeals ***should*** have applied in reviewing the district court's grant of summary judgment to J&H.

facie case, there remained the "permissible inference of discrimination" associated with the prima facie case which, in the presence of a genuine issue as to whether or not Mr. Sempier's performance warranted acceptance of his resignation, entitled Mr. Sempier to a jury trial of his ADEA claim. (18a-19a.)

REASONS FOR GRANTING THE WRIT

The court of appeals held that where an employee makes out a prima facie case under *McDonnell Douglas* and the mandatory presumption of discrimination it entails is dispelled by the employer's proffer of a nondiscriminatory reason, "the permissible inference of discrimination created by the prima facie case" remains, and if there is evidence discrediting the employer's proffered reason, a jury may always find against the employer.

That decision is contrary to decisions of this Court, is in conflict with decisions of other courts of appeals, and raises an issue of public importance.

I.

In *U.S. Postal Service Bd. of Govs.* v. *Aikens*, 460 U.S. 711 (1983), this Court held that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, *whether plaintiff really did so is no longer relevant*" (*id.*, at 715; emphasis added). The prima-facie-case analysis was held pointless in *Aikens* because the *McDonnell Douglas* framework had served its only purpose of putting before the district court "all the evidence it need[ed] to decide whether 'the defendant intentionally discriminated against the plaintiff'" (*id.* at 715; citing and quoting from *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981)). In deciding the

"ultimate question of discrimination *vel non*," this Court said that the district court "should consider all the evidence, giving it whatever weight and credence it deserves" (460 U.S. at 714 n.3).

The court of appeals' decision is thus also contrary to this Court's decision in *Hicks*, the very case it purports to apply. *Hicks* holds that, once the employer has articulated nondiscriminatory reasons for its conduct, "the *McDonnell Douglas* framework -- with its presumptions and burdens -- is no longer relevant" (113 S.Ct. at 2749), and requires that the sufficiency of plaintiff's evidence be judged by the usual standard: whether on all the evidence the trier of fact could rationally conclude by a preponderance of the evidence that defendant had intentionally discriminated against the plaintiff. The standard applied by the court of appeals, which holds that a court cannot grant a defendant's summary judgment motion if the plaintiff has established a *McDonnell Douglas* prima facie case and has put forth evidence that the employer's explanation is not true, is incompatible with the Court's reasoning in *Hicks*. It is, in particular, directly contrary to the following statement (made in a context in which it is assumed that plaintiff has made out a prima facie case):

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, *subject, of course, to appellate review* . . . .

113 S.Ct. at 2756 (emphasis added). A court of appeals reviewing a finding of discrimination is faced with precisely the same question facing a district court on a summary judgment motion: whether a finder of fact could rationally find against the movant or appellant. *Anderson*

v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986); 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524, at 249-51 (2d ed. 1994). If an appellate court may reverse a finding of discrimination based on evidence sufficient to establish a prima facie case together with evidence that the employer's explanation is "unpersuasive or even obviously contrived," it cannot be the case that such evidence always entitles a plaintiff to survive defendant's motion for summary judgment. Yet that is precisely the rule of law the court of appeals articulated here (17a).

II.

The courts of appeals have reached divergent conclusions on the question presented here, largely because they differ in their interpretations of this Court's statement in *Hicks* that

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief if accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

(113 S. Ct. at 2749) The court of appeals below and some others have taken this language to mean that it is *always* within the province of the finder of fact to conclude that the defendant acted with discriminatory intent based upon the elements of a *McDonnell Douglas* prima facie case and evidence that the employer's proffered explanation is not true. Other courts of appeals have understood that language (correctly, J&H submits) to mean only that the probative value of such evidence will *sometimes* be sufficient to permit a finding of discrimination depending upon the totality of the record.

The First and Fifth Circuits have interpreted this Court's decisions as J&H urges here, *see Woods* v. *Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994); *Rhodes* v. *Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994), and the Second Circuit is apparently in accord, *see Saulpaugh* v. *Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993). The First Circuit's recent opinion in *Woods* holds, for instance, that the language from *Hicks* quoted above:

> simply makes clear that the Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of a pretext could provide a strong enough inference of actual discrimination to permit the fact-finder to find for the plaintiff. Conversely, we do not think that the Supreme Court meant to say that such a finding would always be permissible. (For example, suppose an employee made out a truly bare-bones prima facie case of age discrimination, and the employer responded that the employee lacked the necessary skills for the job. Suppose also that unrefuted evidence showed that the response was a pretext, because the employer had fired the employee to conceal the employer's own acts of embezzlement. In such an instance, there would be a prima facie case at the outset and a disbelieved pretext, but we think it plain that no reasonable jury could find age discrimination on such a record.) The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts. (30 F.3d at 260 n.3)

In *Hicks*, this Court also presented a hypothetical case to show that the evidence supporting a prima facie case under *McDonnell Douglas* might ultimately have no probative value

whatever (113 S.Ct. at 2750-51). And in *Hazen Paper Co.* v. *Biggins*, ___ U.S. ___, 113 S.Ct. 1701, 1708 (1993), consistently with the First Circuit's hypothetical in *Woods*, this Court cautioned that "inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where" other motives are present.

The Fourth, Sixth, Eighth and Ninth, and apparently the Tenth and Eleventh, Circuits have taken the view taken by the Third Circuit below. *Mitchell* v. *Data General Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993), *Manzer* v. *Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994); *Gaworski* v. *ITT Commercial Finance Corp.*, 17 F.3d 1104, 1109 (8th Cir. 1994); *Washington* v. *Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Ingels* v. *Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994); *Hairston* v. *Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993). The Ninth Circuit, interpreting the above-quoted language from *Hicks*, stated:

> Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a *prima facie* case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment.

Washington, 10 F.3d at 1433.

The Seventh Circuit has gone both ways. *Compare Palucki* v. *Sears, Roebuck & Co.*, 879 F.2d 1568 (7th Cir. 1989) (decided prior to *Hicks*) and *Rand* v. *CF Industries, Inc.*, 42 F.3d 1139, 1146-47 (7th Cir. 1994), with *Anderson* v. *Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994).

III.

An articulation by this Court of the proper standard by which to evaluate summary judgment motions in employment discrimination cases is a matter of substantial public importance. The *McDonnell Douglas* framework, which was first articulated in the context of alleged race discrimination in hiring under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1. *et seq.*, has since been extended (i) to the other forms of discrimination made unlawful by Title VII and virtually every kind of employment decision, including transfers, *see Goodwin* v. *St. Louis County Circuit Court*, 729 F.2d 541 (8th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985), promotions, *see Holmes* v. *Bevilacqua*, 794 F.2d 142 (4th Cir. 1986), demotions, *see Allen* v. *Montgomery County, Ala.*, 788 F.2d 1485 (11th Cir. 1986), training opportunities, *see Griffin* v. *City of Omaha*, 785 F.2d 620, *reh'g en banc denied*, 40 E.P.D. ¶ 36,151 (8th Cir. 1986), academic tenure, *see Namenwirth* v. *University of Wis. Bd. of Regents*, 769 F.2d 1235 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986), terminations, see *Bluebeard's Castle Hotel* v. *Virgin Islands Dep't of Labor*, 786 F.2d 168 (3d Cir. 1986), and discipline generally, *see Alires* v. *Amoco Prod. Co.*, 774 F.2d 409 (10th Cir. 1985); (ii) to age discrimination under the ADEA, *see Hazen*; (iii) to discrimination-in-employment claims cognizable under 42 U.S.C. §§ 1981 (*see Durham* v. *Xerox Corp.*, 18 F.3d 836 (10th Cir. 1994)) and 1983 (*see Hicks*, 113 S. Ct. at 2746 n.1); (iv) to claimed violations of the anti-discrimination provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140, *see Humphreys* v. *Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992) (compiling cases); (v) to alleged discrimination in violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*, *see Robinson* v. *12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-39 (2d Cir. 1979); and (vi) perhaps also to alleged discrimination in

employment in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 *et seq.*, *see West* v. *Russell Corp.*, 868 F. Supp. 313, 316-17 (M.D. Ala. 1994); *but see Hedberg* v. *Indiana Bell Telephone Co.*, No. IP 93-1344-C, 1994 WL 228184, *6-*7 (S.D. Ind. Mar. 14, 1994).

The "Civil Rights Employment" category of cases filed in the district courts, into which most of the cases brought under the foregoing statutes fall, accounted for about six and a half percent of the cases filed in the district courts in 1994, a figure that has increased more than forty percent in the past two years. The Administrative Office of the United States Courts, *Statistical Tables*, Tables C-2 (1992-94). The number of charges filed with the Equal Employment Opportunity Commission has grown from 63,830 in fiscal 1991, EEOC, Combined Ann. Reps. 1991 & 1992 at 29, to 91,189 in fiscal 1994, Statement of Aletha L. Brown Before U.S. House Committee on Appropriations, Subcommittee on Commerce, Justice, State and Judiciary, March 1, 1995, *available in* 1995 WL 81600 (F.D.C.H.), an increase of forty percent in three years. This rate of growth promises to affect district court dockets increasingly in the years ahead.

If, as J&H submits, the standard applied by the court of appeals below and several other circuits is erroneous, the continued application of that standard will result in unnecessary expenditure of substantial public and private resources, because under that standard meritless cases will routinely survive summary judgment. Under *Burdine* an individual aggrieved by an employment decision who is a member of a group that is able to invoke the *McDonnell Douglas* framework, is required to adduce only minimal evidence to make out a prima facie case (450 U.S. at 253). More often than not, where the plaintiff is a present or former employee, the employer's nondiscriminatory reason for the adverse action will relate, in one way or another, to some aspect of job performance. Given the breadth of pretrial

discovery typically allowed and the infrequency with which human beings make judgments and take actions with respect to other human beings that cannot be made to appear problematic in *some* respect, it is often not difficult to create "a fact issue" with respect to an employee's performance that amounts to nothing more than a difference of opinion.[6] If

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[6] The court of appeals found that "three evidentiary threads" created a genuine issue as to whether Mr. Sempier had been terminated for poor performance (15a-18a). The first consisted of Mr. Sempier's assertions of his own good performance made in certifications submitted in connection with the parties' initial cross motions, and the positive statements regarding Mr. Sempier that Mr. Hatcher made (along with some negative ones) in his affidavit on the initial motions and his subsequent deposition (15a). Such evidence would be competent to establish only a common-place difference of opinion regarding Mr. Sempier's abilities and contribution to J&H as between Mr. Sempier and his sponsor, Mr. Hatcher, on the one hand, and Mr. Johnson, Mr. Hecken and other identified senior Directors on the other. However, the court of appeals found that a jury might reject the opinions of Messrs. Johnson *et al.* on the ground that if they had been honestly held, (i) J&H would have been able to produce more than it had by way of "performance reviews and other documentary evidence . . . that demonstrated poor performance" by Mr. Sempier of his CFO and CAO duties, and (ii) more would have been said to Mr. Sempier (than Mr. Sempier acknowledges was said) to bring home to him that his loss of responsibilities and inferior compensation (about which he did not deny having complained to Mr. Hecken; JA286-87) reflected a consensus among the Directors that his performance as a Director was "poor or inadequate." (16a.)

The second evidentiary thread was said to consist of certain documents, which the court of appeals styled as "two formal performance evaluations from 1988 and 1989" (16a). Mr. Sempier had attached them to one of his certifications on the initial motions with this one-sentence reference to them: "My performance always met or exceeded what was expected of me as demonstrated by the performance appraisals annexed to this certification" (JA306, 308-319). Mr. Hecken's *unanswered* affidavit on

(continued...)

that kind of issue between an employee who is able to invoke *McDonnell Douglas* and his or her employer, plus a prima facie case (which, for policy reasons having only to do with access to the courthouse, "is not intended to be onerous" (9a)), will *always* entitle the employee to a jury trial, the

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[6](...continued)
J&H's second summary-judgment motion explained what these documents were and how they were used, including the fact that they had been prepared by Mr. Sempier himself and included only a few terse (and ambiguous) comments by Mr. Hecken. Mr. Hecken further suggested that if the documents were but read in context they would demonstrate the contrary of what Mr. Sempier claimed they did. (JA784-89.) The district court credited Mr. Hecken's testimony because it was uncontroverted by Mr. Sempier, and held that the documents were of "little value in determining [Mr. Sempier's] true level of performance" (44a). The court of appeals held that the district court had thereby impermissibly weighed the evidence, because it had not taken into account references in Mr. Hatcher's deposition testimony to "performance evaluations," which the court of appeals assumed (without evidentiary foundation) related to the very same documents Mr. Hecken had addressed and contradicted what Mr. Hecken said about them (17a).

The final evidentiary thread did not relate to Mr. Sempier's performance. It consisted of circumstances that Mr. Sempier had unsuccessfully argued were direct evidence of age discrimination: a program targeting redundant and poorly performing employees that J&H had undertaken in mid-1989, the fact that Mr. Hatcher told Mr. Sempier in April 1990 that he would have to *retire*, and the terms of the retirement policy that the Board of Directors maintains for its members. (See 17a-18a.) On plenary review it will clearly appear that these circumstances raise no genuine issue as to any material fact and are of no probative value for Mr. Sempier's ADEA claim. However, the question presented by this Petition does not require that the probative value of that evidence actually be assessed by this Court; it will be J&H's position that under *Hicks*, *Aikens*, *Hazen* and *Anderson*, once the *McDonnell Douglas* presumption is out of the case, such evidence is entitled on summary judgment to whatever consideration it merits, along with all the other evidence, and without reference to where it might have "fit" in terms of the *McDonnell Douglas* framework.

unfairness to employers, to employees who cannot invoke *McDonnell Douglas*, and to overburdened district courts, is manifest.

What the rational development of employment-discrimination law very much needs at this juncture -- especially in the context of ADEA cases, which almost invariably concern long-service employees who typically have little problem establishing minimum qualifications for prima-facie-case purposes -- is an affirmation that an employer does not have to face a jury trial merely because the employee has some plausible basis for contending that the employer should not have taken the action about which he complains: "Whatever the employer's decisionmaking process," the employee must be able to adduce evidence which, regardless of its provenance in terms of the *McDonnell Douglas* framework, would entitle a jury to conclude that "the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Hazen*, 113 S.Ct. at 1706.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

Respectfully submitted,

John F. Cannon
Counsel of Record for Petitioner
125 Broad Street
New York, New York 10004
(212) 558-4000

Robin D. Fessel
Sullivan & Cromwell
New York, New York

Francis X. Dee
David J. Reilly
Carpenter, Bennett & Morrissey
Newark, New Jersey

Of Counsel

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